

)	Docket No. CWA-404-309(a)-06-004
IN THE MATTER OF:)	
)	
)	
The Canyons at Whetstone Ranch – Phase I)	ADMINISTRATIVE ORDER
)	ON CONSENT
)	
Whetstone Development Company,)	Proceeding under Clean Water Act,
)	Sections 308(a) and 309(a),
Respondent.)	33 U.S.C. §§1318(a) and 1319(a)
)	
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This Administrative Order on Consent (“Consent Order” or “Order”) is entered into voluntarily by the United States Environmental Protection Agency, Region 9 (“EPA”), and Respondent Whetstone Development Company (“WDC”). Respondent WDC is the owner and developer of real property located east of State Highway 90 in the City of Benson, Cochise County, Arizona (the “Disturbed Site”). EPA alleges, and Respondent denies, that Respondent has discharged dredged and/or fill material into unnamed washes on the Disturbed Site without authorization under Section 404 of the Clean Water Act (the “Act” or “CWA”), 33 U.S.C. § 1344, in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). This Consent Order directs the Respondent to undertake specified measures to offset the adverse impacts to waters of the United States resulting from the alleged unauthorized discharges.

1. EPA issues this Consent Order under the authority vested in its Administrator by Section 309(a) of the CWA, 33 U.S.C. § 1319(a). This authority has been delegated to the EPA Region 9 Administrator and re-delegated to the Director of EPA's Water Division.
2. Respondent agrees not to contest EPA's jurisdiction or authority to enter into or enforce this Consent Order. Respondent also agrees not to contest the validity of any terms and

conditions of this Consent Order in any action to enforce, or in any action arising from, the Consent Order.

3. EPA's decisions or actions, in entering into, and pursuant to this Consent Order are not subject to judicial review prior to the United States' initiation of judicial action to compel Respondent's compliance with the Consent Order.

III. DEFINITIONS

4. Unless defined herein, terms used in this Consent Order shall have the meaning as assigned in the CWA or in regulations promulgated by EPA or the U.S. Army Corps of Engineers (the "ACOE") under the CWA. The following definitions shall apply to this Consent Order:

5. "Consent Order" or "Order" shall mean this document, all attachments hereto, all its subsequent mutually agreed-to modifications, and all submissions, including, but not limited to, deliverables, plans, schedules, reports (other than annual monitoring reports), maps, and technical memoranda and specifications, which are required by this Consent Order. Upon EPA approval, Respondent's submissions are incorporated and enforceable as part of this Consent Order. In case of inconsistency, this document and its subsequent modifications shall control.

6. "EPA" shall mean the U.S. Environmental Protection Agency.

7. "ACOE" shall mean the U.S. Army Corps of Engineers.

8. "Respondent" shall mean Whetstone Development Company, an Arizona corporation.

9. "Parties" shall mean the EPA and Respondent.

10. "Disturbed Site" shall mean the approximately 100 acres of real property consisting of Phase I of the 1,000-acre "The Canyons at Whetstone Ranch" residential development depicted in the attached jurisdictional delineation performed by Respondent (**Attachment 1**), and which is located in Section 29, southeast portion of Section 30, northeast portion of Section 31, and northwest portion of Section 32, Township 17 South, Range 20 East, Cochise County, Arizona, to the east of State Route 90, approximately 3 miles south of Interstate Highway 10 (I-10), and to the west of the San Pedro River.

11. “404 Preservation Site” shall mean all portions of the area selected and agreed to by Respondent and EPA as suitable to offset the losses of aquatic functions and values in the waters of the United States impacted by Respondent’s alleged unauthorized dredge or fill activities. The 404 Preservation Site is further described in **Attachment 2** and consists of approximately 40 acres of undeveloped land in its Natural Condition.

12. “Natural Condition” shall mean the condition of the 404 Preservation Site as it exists at the time of the effective date of this Consent Order.

13. “Work” shall mean all activities Respondent is required to undertake and accomplish under this Consent Order.

IV. PARTIES BOUND

14. This Consent Order shall be binding on Respondent and its elected officials, officers, directors, partners, agents, employees, attorneys, successors and assigns, and on all persons, independent contractors, contractors, and consultants acting in concert with Respondent.

15. The undersigned signatory for Respondent certifies that he is authorized to execute this Consent Order and legally bind Respondent WDC.

V. STATEMENT OF PURPOSE

16. The parties enter into this Consent Order to compensate for losses of the functions and values of waters of the United States at the Disturbed Site caused by Respondent’s allegedly unauthorized discharge of dredged or fill material to these waters by conveying ownership of the 404 Preservation Site, which contains waters of the United States containing functions and values similar to those at the Disturbed Site, to the City of Benson for perpetual management for conservation purposes.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

17. Under Section 301(a) of the Act, 33 U.S.C. §§ 1311(a), it is unlawful for any person to discharge any pollutant, including dredged or fill material, from a point source into any “navigable waters” without a permit issued under, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344. “Navigable waters” are defined as “waters of the United States” by Section 502(7) of the Act, 33 U.S.C. § 1362(7), and include all waters which are, were, or may be, used in

1 interstate commerce, including tidal waters, their tributaries, and wetlands adjacent to these
2 waters. 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s).

3 18. Section 404 of the Act, 33 U.S.C. § 1344, establishes a permit program regulating the
4 discharge of dredged or fill material into navigable waters. Under this program, the ACOE has
5 the authority to issue permits for the discharge of dredged or fill material into navigable waters.

6 19. The term “person” is defined in Section 502(5) of the Act, 33 U.S.C. § 1362(5), to
7 include an individual, corporation, partnership, association, State, municipality, commission, or
8 political subdivision of a State, or any interstate body.

9 20. The term “discharge of a pollutant” includes any addition of any pollutant to navigable
10 waters from any point source. 33 U.S.C. § 1362(12). The term “pollutant” includes, but is not
11 limited to, earthen material, dredged spoil, solid waste, biological materials, rock, and sand.
12 33 U.S.C. § 1362(6).

13 21. The term “point source” means any discernible, confined and discrete conveyance, from
14 which pollutants are or may be discharged, and includes bulldozers and other earth-moving
15 equipment. 33 U.S.C. § 1362(14).

16 22. Respondent is, and at all times relevant to this Consent Order was, a corporation,
17 organized under the laws of Arizona. Thus, Respondent is a person under Section 502(5) of the
18 Act. 33 U.S.C. § 1362(5).

19 23. Respondent is the owner of the Disturbed Site, upon which Respondent has proposed to
20 build, and is building, a 1,000-acre four-phase residential development referred to as “The
21 Canyons at Whetstone Ranch.”

22 24. The Disturbed Site contains unnamed washes that are tributary to the San Pedro River,
23 which is a waters of the United States within the meaning of Section 502(7) of the Act, 3 U.S.C.
24 § 1362(7), and thus are themselves waters of the United States. *See also* 40 C.F.R. § 230.3(s).
25 The San Pedro River is tributary to the Gila River, which is in turn tributary to the Colorado
26 River, which is a navigable-in-fact water and water of the United States within the meaning of
27 Section 502(7) of the Act, 3 U.S.C. § 1362(7), and 40 C.F.R. § 230.3(s).

25. At no time did Respondent have authorization to discharge to waters of the United States on the Disturbed Site under Section 404 of the CWA, 33 U.S.C. § 1344.

26. On February 16, 2005, EPA, ADEQ, and the ACOE inspected the Sites, and EPA identified several waters of the United States at the Sites that are tributary to the San Pedro River.

27. Based on information obtained by EPA during and after the February 16, 2005 inspection, EPA alleges that Respondent conducted dredge and fill activity in waters of the United States at the Disturbed Site, and on adjoining upland areas on the Disturbed Site. In this process, Respondent left behind berms, and stockpiles of dredge and fill material in waters of the United States. In addition, Respondent placed or directed the placement of rip-rapped pad fills and storm water controls, such as silt fences and fiber rolls, in waters of the United States, which blocked or altered the natural water flows in these waters.

28. Respondent undertook construction preparation activities and/or construction activities, including initial grading, that resulted in the discharge of dredged and/or fill material to waters of the United States, from various earthmoving equipment meeting the definition “point source” in Section 502(14) of the CWA, 33 U.S.C. § 1362(14). These discharges resulted in adverse impacts to approximately 0.25-acres of waters of the United States on the approximately 100-acre Disturbed Site.

29. By discharging pollutants into waters of the United States without a permit under the CWA, Respondent has violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

30. Respondent denies each and every conclusion of law and determination set forth in paragraphs 17 through 29 above.

VII. CESSATION OF UNAUTHORIZED DISCHARGES

31. Respondent shall not discharge pollutants into any waters of the United States on the Disturbed Site except in compliance with the CWA.

VIII. WORK TO BE PERFORMED

32. Within thirty (30) days of the effective date of this Order, Respondent will convey the 404 Preservation Site to the City of Benson pursuant to a Gift Warranty Deed that includes a

1 Declaration of Restrictive Covenants that requires the City of Benson to maintain the 404
2 Preservation Site in its Natural Condition (**Attachment 3**). Title to the 404 Preservation Site
3 was conveyed free of any easements, restrictions, exclusions or other encumbrances except as
4 specifically set forth in Attachment 2.

5 33. The purpose of the 404 Preservation Site is to preserve and protect in perpetuity
6 approximately 40 acres of land in its Natural Condition for conservation purposes. Conservation
7 and protection of this area (including the approximately 2.5 acres of waters of the United States
8 included within) has been determined by EPA to be appropriate and practicable mitigation for
9 the temporal and permanent loss of the approximately 0.25 acres of waters of the United States at
10 the Disturbed Site.

11 34. A management framework for the 404 Preservation Site shall be developed by
12 Respondent and the City of Benson and submitted to EPA for approval within sixty (60) days of
13 the effective date of this Consent Order. The management framework shall demonstrate that the
14 City of Benson will take appropriate and practicable steps to ensure that the wetland and other
15 aquatic resources on the 404 Preservation Site will be protected in perpetuity. EPA recognizes
16 that, as an element of its management of the 404 Preservation Site, the City of Benson may retain
17 title to the 404 Preservation Site or convey an interest in the 404 Preservation Site to a third
18 party while retaining a conservation easement to ensure protection of the Natural Condition of
19 the 404 Preservation Site in perpetuity. The management framework is intended to provide
20 sufficient flexibility to support either of these approaches to the management of the property.
21 EPA and ACOE shall be identified as intended third party beneficiaries of the grant of a
22 conservation easement as to the 404 Preservation Site, and shall be provided notice of and the
23 right to approve any transfer of the conservation easement. EPA approval of the management
24 framework shall not be unreasonably withheld consistent with the terms of this paragraph. EPA
25 shall provide written notice of any action approving or disapproving of a proposed management
26 framework to Respondent and the City of Benson.

27 35. Upon EPA's approval of the management framework provided for in Paragraph 34
28 above,

Respondent shall, by thirty (30) days of such approval, submit to EPA a proposed monitoring plan for EPA's approval that shall include, *inter alia*, success criteria that will be used to evaluate whether the Preservation Site is being maintained in its Natural Condition and in conformity with the EPA-approved management framework and Declaration of Restrictive Covenants; and Respondent shall also:

a. implement the EPA-approved monitoring plan; which shall include providing annual monitoring reports to EPA, due no later than September 30th of each year, for a period of five years after the 404 Preservation Site is conveyed to the City of Benson; and

b. provide EPA with an aerial photograph of the 404 Preservation Site and surrounding vicinity with the final annual monitoring report.

IX. SATISFACTION

36. Within thirty (30) days of Respondent's submittal of the final annual monitoring report to EPA as provided for in Paragraph 35.b above, Respondent shall submit a notice of completion of the requirements of the Work required by this Consent Order to EPA in the manner outlined in section X below.

X. SUBMISSIONS AND NOTIFICATIONS

37. All submissions required by this Consent Order shall be signed by a duly authorized representative of Respondent. The authorization must be in writing and specify either an individual or a position having responsibility for the overall operation of the activities being reported or for Respondent's environmental matters.

38. The person signing Respondent's submissions shall make the following certification:

I certify under penalty of law that the information submitted is true and correct to the best of my knowledge and belief. I am aware that there are significant penalties for submitting false information, including, but not limited to, the possibility of fines and imprisonment for knowing violations under § 309 of the Clean Water Act, 18 U.S.C. § 1001, and other relevant federal statutes.

39. Unless otherwise specified or requested by EPA, Respondent shall provide each deliverable required under this Consent Order by first-class mail addressed to:

Jason Brush
Wetlands Regulatory Office (WTR-8)
U.S.EPA Region IX

75 Hawthorne St.
San Francisco, CA 94105-3901

40. Submissions by Respondent shall be deemed made on the date they are postmarked.

XI. FAILURE TO COMPLY WITH CONSENT ORDER

41. EPA reserves all available legal and equitable remedies to enforce this Consent Order, and the right to seek recovery of any costs and attorney fees incurred by EPA in any actions against Respondent for non-compliance with this Consent Order.

42. EPA expressly reserves its right to seek civil, administrative or criminal penalties for violations of the CWA that occurred at the Disturbed Site.

43. Failure to comply with this Consent Order is a violation of the CWA. Such violation may subject Respondent to civil penalties not to exceed \$32,500 per day for each violation under Section 309(d) of the CWA. 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4.

XII. SCOPE OF CONSENT ORDER

44. This Consent Order is not and shall not be construed to be a permit under the CWA, nor shall it in any way relieve or affect Respondent's obligations under the CWA, or any other applicable federal, state or local laws, regulations and permits. Compliance with this Consent Order shall be no defense to any actions commenced pursuant to such applicable laws, regulations or permits.

45. This Consent Order shall in no way affect the rights of EPA or the United States against any person not a party hereto.

46. On March 17, 2005, EPA issued a Unilateral Administrative Order (EPA Docket No. CWA-404-309(a)-05-009) to Respondent. Upon the effective date of this Consent Order, the March 17, 2005 Unilateral Administrative Order is terminated.

47. Neither the issuance of this Consent Order, nor Respondent's compliance with it, shall prejudice EPA's authority to take any further action, enforcement or otherwise, with respect to any third party not a party to this Order, for violations of the CWA at the Disturbed Site.

XIII. SEVERABILITY

1 48. The provisions of this Consent Order shall be severable. Should any provision be
2 declared by a court of competent jurisdiction to be unenforceable, the remaining provisions shall
3 remain in full force and effect.

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5 **XIV. EFFECTIVE DATE**

6 49. This Consent Order shall take effect upon signature by all parties.

7
8 IT IS SO AGREED AND ORDERED:

9 For UNITED STATES
10 ENVIRONMENTAL PROTECTION AGENCY
11 REGION 9

12 Dated: _____

13 Alexis Strauss, Director
14 Water Division

15 For Respondent, Whetstone Development Company

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17 Dated: _____

18 Pat Lopez
19 President & CEO
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ATTACHMENT 1

**RESPONDENT'S
JURISDICTIONAL DELINEATION OF
THE DISTURBED SITE**

ATTACHMENT 2

**RESPONDENT'S
DESCRIPTION AND DELINEATION OF
THE 404 PRESERVATION SITE**

ATTACHMENT 3

**RESPONDENT'S
WARRANTY DEED
AND
DECLARATION OF RESTRICTIVE COVENANTS**